

Dang (Migration) [2018] AATA 2803 (29 June 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Trung Nghia Dang
VISA APPLICANTS:	Ms Thi Bich Dinh Miss Dinh Thao Uyen Tran Master Duc Thinh Tran Master Duc Tien Tran
CASE NUMBER:	1609829
DIBP REFERENCE(S):	OSF2015070408
MEMBER:	Amanda Mendes Da Costa
DATE:	29 June 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the applications for Prospective Marriage (Temporary) (Class TO) visas for reconsideration, with a direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage (temporary)) visa: • cl.300.211 to Schedule 2 to the Regulations; • cl.300.214 to Schedule 2 to the Regulations; • cl.300.215 to Schedule 2 to the Regulations; and • cl.300.216 to Schedule 2 to the Regulations • cl.300.221 to Schedule 2 to the Regulations.

Statement made on 29 June 2018 at 2:02pm

CATCHWORDS

Migration – Prospective Marriage (Temporary) (Class TO) visa – Subclass 300 (Prospective Marriage) – Genuine intention marry and live together – Engagement ceremony – Location of ceremony – Shared some day-to-day expenses – Temporary household registrations – Receipts of hotel stays – Statements from family and friends – Care for the applicant's daughter – Knowledge of each other's origin – Regular telephone communication – Decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65, 359AA

Migration Regulations 1994 (Cth), r 1.15A, Schedule 2 cls 300.211, 300.214, 300.215, 300.216, 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant the visa applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicants applied for the visas on 7 May 2015. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.300.211 and cl.300.221.
3. The delegate refused to grant the visas on 13 June 2016 on the basis that the first named visa applicant did not satisfy cl.300.221 of Schedule 2 to the Regulations because the delegate was not satisfied that the evidence was sufficient to demonstrate that the parties were in a genuine and continuing relationship and genuinely intended to live together as spouses.
4. The review applicant seeks review of the delegate's decision. For that purpose he provided the Tribunal with a copy of the primary decision.
5. The review applicant appeared before the Tribunal on 26 April 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Le Minh Dang, the review applicant's brother and Canh Dang Le, a friend of the review applicant together with Ms Thi Bich Dinh, the primary visa applicant, by telephone from Vietnam.
6. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
7. The review applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the parties genuinely intend to marry and live together as spouses.

Does the visa applicant intend to marry an eligible person?

10. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. A copy of the bio-pages of Mr Dang's Australian passport is in the Department's file. From this evidence, the Tribunal is satisfied that the review applicant is an Australian citizen and accordingly, the requirements of cl.300.211 are met.

Have the applicants met in person and are they known to each other personally?

11. Clause 300.214 requires that the parties have met in person since each of them turned 18 and that they are known to each other personally. Mr Dang is aged 53 whilst Ms Dinh is aged 40 years. The parties claim to have first met in 2013 at the home of a mutual friend in Vietnam. Therefore, at the time of application, the requirements of cl.300.214 were met.

Do the parties genuinely intend to marry?

12. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period. The parties gave provided oral and photographic evidence attesting to the holding of an engagement ceremony in Vietnam on 6 January 2015.
13. The parties told the Tribunal that if Ms Dinh were granted a visa, they intended to marry in a civil ceremony at a restaurant. Mr Dang told the Tribunal that he had looked at two local restaurants, which he considered suitable for the wedding ceremony and reception. The Tribunal acknowledges the constraints on the parties in organising a wedding when they are living in two countries. The Tribunal notes that cl.300.215 (b) requires that the marriage is intended to take place within the visa period and is satisfied on the evidence of the parties that they intend to make arrangements for their wedding together in Australia if the visa is granted. Accordingly the Tribunal is satisfied on the evidence before it that the parties have a genuine nature of their intention to marry and live together as husband and wife.

Do the parties genuinely intend to live together?

14. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together, or not live separately and apart on a permanent basis: s.5F (2) (a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the Tribunal may have regard to the considerations set out in r.1.15A (3) for spousal relationships: r.1.15A (4). While it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.
15. Having regard to the considerations for a spousal relationship, and the degree to which these factors may be applied to determine a future intention, the Tribunal makes the following findings.

16. The financial aspects of the relationship

17. Mr Dang is engaged in full-time employment in a vehicle manufacturing business. He owns his own motor vehicle but does not own any real estate. He has modest savings in a bank account.
18. Ms Dinh has her own business, selling rice from her home. In addition to owning her home, she has stock and a modest amount of savings.
19. The parties each told the Tribunal that they did not have a joint bank account with the other. Mr Dang initially said that he could not remember whether he and Ms Dinh had made any

inquiries in Vietnam about opening a joint account. He later said that he and Ms Dinh had made such enquiries of the Commonwealth Bank and several Vietnamese banks in Vietnam but were advised that it was not possible to open a joint account because they were not a married couple. In her oral evidence Ms Dinh said that she and Mr Dang had made no such enquiries regarding opening a joint account. However, the parties did each indicated in their oral evidence that if the visa is granted and they marry, they intend to pool their incomes and open a joint bank account.

20. The principal documentation provided by the parties in relation to the pooling of their finances is one receipt which shows that AUD 500 was sent by Mr Dang to Ms Dinh in November 2014. The Tribunal also acknowledges that the parties have shared some day-to-day expenses when they have lived together in Vietnam. Given these matters, the Tribunal finds some evidence that they have pooled their finances but not in a substantive way or in relation to major financial commitments. They have not opened a joint bank account. Moreover, the Tribunal finds no evidence of any joint ownership of real estate or other major assets or any joint liabilities. The Tribunal further finds no evidence that the parties owe a legal obligation in respect of the other.
21. The Tribunal appreciates that as the parties are living in separate countries, it is difficult for them to pool their finances and accepts their oral evidence that if they are able to live together in the same country, they intend to conduct their financial affairs as a couple, make joint decisions and pool their financial resources.

22. *The nature of the household*

23. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
24. The Tribunal notes that the parties provided the Department with temporary household registrations for Mr Dang at the residence of the relative who hosted the parties' engagement party, for 29 December 2014 and for the period 4 March 2015 to 16 March 2015; and at the home of Ms Dinh for the periods 5 to 8 January 2015 and 4 to 18 March 2015. The parties also provided the Department and Tribunal with receipts for hotel stays. The Tribunal accepts that these documents provide some evidence of co-habitation by the parties, during the above periods.
25. Mr Dang has two adult children who live independently of him. Ms Dinh has three children, the youngest two of whom are in her sole care. Her eldest daughter is studying in Australia and currently lives at the home of Mr Dang's sister, who cares for her. Mr Dang also lives there although he does not have formal responsibility for the daughter's care.
26. Mr Dang told the Tribunal that since his engagement to Ms Dinh he had travelled to Vietnam on nine occasions between 2015 and 2018. He said that during these trips he lived with Ms Dinh's home in Vung Tau. He explained that Miss Dinh's niece who worked for her in her business was responsible for the majority of the housework in the home stop Ms Dinh said in her oral evidence that she did not employ her niece and that she was responsible for her own housework.
27. The Tribunal is not satisfied that the parties have shared the responsibility of housework or care of children during the periods they have lived together in Vietnam. However, the Tribunal notes that Ms Dinh's eldest child lives with Mr Dang and his sister in Melbourne. Although this daughter is formally in the care of Mr Dang's sister, the Tribunal accepts that Mr Dang has been involved in her welfare since she has been living in his household.

28. *The social aspects of the relationship*

29. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
30. The Tribunal received a statement from Mr Dang's daughter, Phoung Thao Dang, dated 17 April 2018 regarding her father's relationship with Ms Dinh. Ms Dang states that her father has introduced her to Ms Dinh and she has messaged and video-chatted with her through Facebook. Ms Dang is of the opinion that Ms Dinh's personality is very compatible with that of her father and that she accepts that he has found love and happiness with Ms Ding. Ms Dang considers that her father's relationship with Ms Dinh is a genuine one.
31. The Tribunal heard oral evidence and considered a Statutory Declaration executed by Mr Le Minh Dang on 28 April 2015. Mr Le Minh Dang told the Tribunal that he first became aware of his brother's relationship with Ms Dinh prior to 2015. He said that his brother had said he and Ms Dinh were very compatible and that he loved her. Mr Le Minh Dang explained that he visited Ms Dinh in Vung Tau City in June 2016 to give her gifts from his brother. Mr Le Minh Dang's oral evidence was consistent with his Statutory Declaration.
32. The Tribunal also heard oral evidence from Mr Canh Dang Le, a friend of the applicant and considered a Statutory Declaration executed by him on 28 April 2015. Mr Le told the Tribunal that he had known Mr Dang for approximately 13 years. He said that he had met Ms Dinh once in June 2014 when Mr Dang requested him to deliver gifts from him to Ms Dinh. Mr Le's oral evidence was consistent with his Statutory Declaration.
33. The parties provided the Tribunal with a range of photographs purporting to detail the parties' time together, including traditional photographs taken at the time of their engagement celebration in January 2015 and casual photographs taken at tourist destinations, airports and restaurants. The Tribunal finds some evidence that the parties have undertaken and plan joint social activities including the engagement party in January 2015. On the basis of the photographic evidence and the evidence of Mr Dang's family members and his friend, the Tribunal finds that the persons represent themselves to others as being in a genuine and continuing relationship and that the relationship is genuine and continuing in the opinion of their friends, family members and acquaintances. Within the constraints of living in separate countries, the Tribunal also finds that the couple undertake and plan joint social activities on the occasions the couple have resided together in Vietnam.

34. *The nature of the persons' commitment to each other*

35. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the person's commitment to each other.
36. The parties claim to have met in December 2013 when Mr Dang was visiting Vietnam. They were introduced at a Christmas party, held at the home of a neighbour of Ms Dinh. This neighbour is also a friend of Mr Dang. The parties did not meet again during that visit by Mr Dang. After he returned to Australia in January 2014, the parties maintained contact by telephone.
37. The parties' told the Tribunal that after communicating on a regular basis by telephone, they admitted their feelings for each other in August 2014. In October 2014, Mr Dang returned to Vietnam, where he and Ms Dinh decided to marry. In December 2014 Mr

Dang again visited Vietnam where he stayed with Ms Dinh. They held an engagement party at the home of a distant relative of Ms Dinh, in Ho Chi Minh City on 6 January 2014. Mr Dang returned to Vietnam on the following dates where he claimed to have stayed with Ms Dinh at her home: 4 March 2015 to 25 March 2015; 6 May 2015 to 31 May 2015; 12 November 2015 to 6 December 2015; 5 January 2016 to 19 January 2016; 23 July 2016 to 6 August 2016; 23 December 2016 to 14 January 2017; 10 June 2017 to 20 June 2017 and 22 December 2017 to 16 January 2018.

38. The Tribunal does hold some concerns about the following aspects of the parties' evidence.
39. Mr Dang acknowledged that his former wife had travelled from Vietnam to Australia on the same flights as him on 20 January 2013 and 20 January 2014. He said that this was purely coincidental. Pursuant to section 359AA of the Act, the Tribunal put to Mr Dang that in an interview with Departmental staff on 17 November 2015 he said that he was not sure whether his former wife was on the same flights as him. Mr Dang told the Tribunal that he could not explain why his former wife was travelling on the same flights as him on two occasions despite the fact that they separated in 2012. However, the Tribunal doubts that Mr Dang would have failed to recognise his former wife on two flights.
40. The parties told the Tribunal that they held an engagement party in Ho Chi Minh City on 6 January 2015. This celebration was held at the home of a distant relative of Ms Dinh and was attended by approximately 40 to 50 guests. The Tribunal notes that no family members (including Ms Dinh's two younger children) attended this celebration. The Tribunal asked the parties why they did not hold their engagement party in Vung Tau City, where Ms Dinh, the youngest children, her sister and her sister's family all live. Ms Dinh told the Tribunal that Vung Tau City is approximately 100 kilometres from Ho Chi Minh City. The parties told the Tribunal that they could not hold the party at Ms Dinh's home as it was small and full of her businesses stock and that Mr Dang did not want to hold the celebration in a restaurant. The party said that their engagement party was attended by their host, his friends three of Ms Dinh's friends and the friends of Mr Dang. When asked why her two younger children did not attend the celebration Ms Dinh said that one child was at school and the other was sick. Ms Dinh said her sister and her sister's family did not attend because her sister was looking after Ms Dinh's business in her absence. The Tribunal finds it difficult to accept that the parties would choose to have their engagement party at a venue which was not near Ms Dinh's home and does not accept as credible their explanations for not having Ms Dinh's family members present.
41. During his interview with Departmental staff on 17 November 2015 Mr Dang said that he was unaware of which province Ms Dinh's mother lived in despite stating that he met her in October 2014. In her oral evidence, Ms Dinh said that she did not know where Mr Dang was born in Vietnam, apart from being aware he was from 'the North'. The parties are from the same district, Hai Hau in Nam Dinh Province. The Tribunal doubts that the parties would not be aware of that their families originate from the same district and province in Vietnam.
42. As noted above, the Tribunal has not uncritically accepted the evidence. However, the Tribunal is cognizant of the fact that the parties live in different countries and have spent limited periods of time together. Despite the inconsistencies in their evidence and the arrangements for their engagement party, the Tribunal is satisfied that they are a couple with a genuine intention to marry. The visa applicant gave credible oral evidence regarding the review applicant, describing him as a positive and optimistic person with whom she got on well. Mr Dang spoke positively of Ms Dinh, explaining that they liked cooking and eating together and liked to help each other. He described his feelings for Ms Dinh as "strong" and further told the Tribunal that he wanted to assist Ms Dinh in caring for her children. The Tribunal accepts that the arrangements by which Mr Dang's sister is caring for Ms Dinh's sister was the result of Mr Dang's wish to assist Ms Dinh and her children.

43. The parties provided the Tribunal with records of telephone communication between them for the period 22 June 2016 to January 2018. Upon considering this evidence, the Tribunal accepts that the parties were in regular contact during this period of time, suggesting that they have an ongoing and long term relationship.
44. On the basis of the evidence before it, the Tribunal accepts that the parties have lived together for short periods over the past three years and that they have been in regular communication during their periods of separation. The Tribunal further accepts that parties draw a substantive degree of companionship and emotional support from each other as would demonstrate their genuine intention to live together and marry.
45. On the basis of the above the Tribunal is satisfied that at the time of the visa application the parties genuinely intended to live together as spouses, and therefore cl.300.216 is met.

Do the parties continue to meet time of application requirements?

46. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses. The Tribunal is satisfied that at the time of this decision cls.300.211; 300.214; 300.215 and 300.216 are met.
47. For the reasons above, the Tribunal finds the visa applicant satisfies the criteria for the grant of the visa.
48. As the visa applicant satisfies the primary criteria for the grant of a Prospective Marriage visa, the secondary applicants meet the criteria for a Subclass 300 visa as members of the family unit of a person who has satisfied the primary criteria.

DECISION

49. The Tribunal remits the applications for Prospective Marriage (Temporary) (Class TO) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 300 (Prospective Marriage (temporary) visa:
 - cl.300.211 of Schedule 2 to the Regulations;
 - cl.300.214 of Schedule 2 to the Regulations;
 - cl.300.215 of Schedule 2 to the Regulations; and
 - cl.300.216 of Schedule 2 to the Regulations
 - cl.300.221 of Schedule 2 to the Regulations.

Amanda Mendes Da Costa
Member